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Supreme Court of the United States

OCTOBER TERM—1950

No. 201

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. McCABE, ABRAHAM J. ISSERMAN and EUGENE DENNIS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING AND MOTION FOR STAY OF MANDATE

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PETITION FOR REHEARING AND MOTION FOR STAY OF MANDATE

To the Supreme Court of the United States:

Petitioners pray that this Court grant rehearing of its decision of March 10, 1952 affirming the judgment below.

Reasons for Granting Rehearing

1. The majority opinion evaluates petitioners' conduct and its "actual effect" upon the trial reviewed in *Dennis* v. *United States*, 341 U. S. 494. It thereby follows the Government's approach objected to by petitioners upon oral argument. For this Court limited certiorari to the procedural issue (342 U. S. 858), and hence petitioners were precluded from addressing themselves to the merits. This limitation was of course an unreal one,[1] but petitioners

[1] The absence of a hearing on the merits here as well as below necessarily causes judicial error. This Court believed that the characteristics of "the behavior punished" (p. 3, Jackson, J.) were "relevant to the questions of law." One such characteristic, it said, was that the acts took place "in the presence of the jury." Actually every criticized act of petitioner McCabe occurred outside the jury's presence. This illustrates how judgment without trial and a limited review combine to hide the facts.

were bound by it. Accordingly, it is unfair for this Court to decide the narrow question for review upon a broad evaluation of conduct which its own order barred petitioners from discussing.

2. The injury to petitioners is compounded by the Court's reliance on the views of petitioners' conduct reflected in the Court of Appeals' decision in the *Dennis* case, 183 F. 2d 201, 225 in which this Court denied review of the facts, 340 U. S. 863. In that case the appellate court decided that the conduct of the judge did not deprive the defendants of a fair trial. This is very different from a finding that counsel were guilty of criminal contempt. The majority opinion treats these factual matters as relevant to the exercise of the trial judge's power. Accordingly, petitioners should have been heard on the facts by this Court.

3. The Court agrees that Rule 42 was intended to make explicit the prevailing usages at law authorizing punishment of contempts. But it disregards its many prior decisions constituting and discussing the prevailing practice. Its reason for this divergence from accepted canons of statutory construction is that "Cases prior to it grew out of facts so distinguishing that their decisions are of little value as precedents" (p. 6, Jackson, J.).

However distinctive the facts, the rule of law enunciated in those cases is clear and fully applicable to this case. The majority opinion, content with a footnote citation, does not discuss the principles laid down in *Ex parte Terry*, 128 U. S. 289, and *Cooke* v. *U. S.*, 267 U. S. 517, 534—the very cases referred to in the Notes of this Court's Advisory Committee on Rules of Criminal Procedure. The weight given to the Committee's Notes has been recognized by Chief Justice Stone in *Mississippi Pub. Corp*, v. *Murphree*, 326 U. S. 438, 444, and Mr. Justice Jackson in *United States* v. *Smith*, 331 U. S. 469, 473-474. These are the principles:

(1) Summary contempt power may be exercised only where necessary for the court's "right of self-preservation," *Marshall* v. *Gordon*, 243 U. S. 521, 541; (2) such necessity exists only where it is "the least possible power adequate to the end proposed," *Anderson* v. *Dunn*, 6 Wheat. 204, 231; (3) where necessity does not compel this summary action, the requirements of due process, including a hearing, must be met. Such too was the view of this Court, recently expressed without dissent on this point, *In re Oliver*, 333 U. S. 257, 274-275.

These principles have been applied in three cases not noted in our original brief:[2]

In re Foote, 76 Cal. 543;
People v. *Burt*, 257 Ill. App. 60, 61;
In re Pollard, L. R. 2 P. C. 106, 120.

In each it was held that summary action could not be taken after the event. In the *Burt* opinion, the Court concluded: "One cannot be deprived of his liberty in this country without due process of law." The *Pollard* case was in many ways similar to this one. A barrister in Hong Kong was censured and requested to apologize for repeated misconduct on one day. Several days later the trial judge declared him guilty of contempt and punished him. The judge thus explained his delay in taking action: "I feared that anger might be present in my mind" (*id.* 114) (*cf.* Mr. Justice Jackson's argument, *infra*). It was held that he could not thus punish the barrister "unless the specific offense charged against him be distinctly stated and an opportunity of answering it given to him." (*id.* 120).

Had these precedents and principles been followed here, the judgment of conviction would have been reversed.

4. The Court states that delay in adjudication without hearing is beneficial to the petitioners because it permits a

[2] The first two cases were cited upon oral argument; the third has just come to our attention.

judgment "well-considered" rather than the result of "irritation" (p. 9, Jackson, J.). This argument assumes a power to act summarily when the emergency which alone justifies that extraordinary power no longer exists. Nor does the length of *ex parte* deliberation, as such, make for due process. The Fifth Amendment requires something more: the right to offer evidence, explanation and argument at a hearing. Only when these rights are granted is the passage of time meaningful in terms of due process.

5. Against the arguments of precedent and equitable treatment, the Court justifies the deferment of summary action on the ground that the trial judge possibly feared that it would "prejudice his client" before the jury (p. 8, Jackson, J.). That this was not a consideration in the present case appears from the Appendix to Mr. Justice Frankfurter's opinion. The jury was repeatedly apprised by the trial judge of his hostility toward defense counsel.

There is further evidence that this was not a factor. Several of the defendants on trial were summarily convicted of contempt during its progress (*U. S.* v. *Gates, et al.*, 176 F. 2d 78; *U. S.* v. *Hall*, 176 F. 2d 163; *U. S.* v. *Green*, 176 F. 2d 169). Fear of prejudicing them did not deter the trial judge from summary punishment. Only his judgment of such necessity could have justified his taking such action. His failure to act against petitioners until much later was a recognition of the absence of that necessity which alone justifies the denial of hearing.

6. The three dissenting opinions contain, albeit with circumspection, the most critical comments upon a trial Judge's behavior ever employed by this Court. The majority opinion is silent upon this question, perhaps from a sense of delicacy which must affect one judge's discussion of another's conduct. But when the effect of avoidance is to imprison lawyers and ruin their careers, this Court may not turn away.

It is not necessary to cite reference in support of Mr. Justice Douglas's photographically accurate conception of

a judge who "used the authority of the bench to whipsaw the lawyers, to taunt and tempt them, and to create for himself the role of the persecuted." What is material and relevant and cause for reversal is the existence of the extreme personal interest of the trial judge in the punishment of the lawyers who, in his view, to quote Mr. Justice Douglas's alternative conception, "conspired to drive a judge from the bench."

No member of this Court suggests that the Fifth and Sixth Amendments permit Rule 42, unlike all other law, to be administered by a partisan judge. Elementary principles of fair play forbid that suggestion. Instead, Mr. Justice Jackson states that virtually "any contempt of a court committed in the presence of a judge during the trial will be an offense against his dignity and authority" (p. 109). Surely this is an oversimplification which would disregard the existence of that special type of case represented here and recognized by Mr. Chief Justice Taft in the *Cooke* case:

> "The case before us is one in which the issues between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows" (267 U. S. at 539).[3]

There is a difference between disobeying an order of the trial judge and attempting to undermine his health. A judge who punctuates a trial with observations[4] about his need for police protection, with complaints that he "must suffer the excoriations and accusations of counsel," who refers to them as "You Communists," and describes one as "impudent" and another as a liar "caught red-

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[3] It was the view of the Chief Justice that for this reason the contempt trial should be before an impartial judge. The Advisory Committee's notes show that this is still the law.

[4] Mr. Justice Frankfurter's opinion herein, Appendix, pp. 31, 37, 49, 57, 58.

handed" does not meet this Court's standard that a judge must have "no interest other than the pursuit of justice" (*Adams ex rel. McCann* v. *U. S.*, 317 U. S. 269, 275).

7. The lawyer petitioners strongly urge reconsideration for reasons affecting both their individual careers at the Bar and the administration of justice. Without a hearing they have been convicted of crime and sentenced to prison. These convictions have instigated disciplinary proceedings against several of them. In at least one case, that of petitioner Isserman, the New Jersey Supreme Court proposes now to disbar him without any hearing. It seeks to rely solely upon this Court's affirmance of the contempt conviction on the theory that it precludes any examination of the facts. Thus, one adjudication made without hearing is the foundation for another adjudication without hearing. How swiftly does one denial of due process lead to another!

The result is that without opportunity to defend themselves, below or in this Court, these petitioners are faced with an unending train of consequences: prison sentences, personal humiliation, economic ruin and the end of their long and honorable professional lives.

The deleterious effect of such summary action upon the representation of unpopular minority groups is denied by the majority opinion. We ask the Court to pause one moment before it gives finality to a proposition so contrary to the realities of today's political trials. A court which has had before it such cases as *Dennis, supra, American Communications Association* v. *Douds*, 339 U. S. 382, and a host of others, is surely not unaware of what is transpiring today in the United States. It must know that throughout the United States judges, even in non-political cases, have reminded lawyers of Judge Medina's action and have tightened the judicial reins. A lawyer will not be afraid to assert his client's interests with the Bar's traditional vigor, when he knows that he cannot be summarily punished at the end of the trial for something that may have occurred, as here, days, weeks and even months earlier.

Under this decision, no lawyer is safe because any sharp colloquy may ultimately be deemed contempt and cause for punishment without hearing. As for cases involving political issues—the reluctance of lawyers to represent defendants has become a national scandal. This decision assures a further shrinkage in the small number of lawyers ready to brave economic injury and other business and community pressures.

Just as lawyers have particular obligations to the courts they serve, so have the courts a special responsibility to protect their lawyer-officers. The majority of this Court, however convinced of the soundness of its own views, cannot but recognize the weight of the considerations urged in the three dissenting opinions. It must know that it has made a trial conducted in a tense "political and emotional atmosphere"[5] the occasion for "a considerable departure from orthodox procedure."[6] Rehearing, though frequently sought, is not often granted. But the uniqueness and importance of the issues presented, the effect of the affirmance upon members of the Bar, and the very serious doubts that must arise from the thoughtful dissents as well as from the foregoing arguments, justify and require a rehearing of this case.

Respectfully submitted,

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LEONARD B. BOUDIN,
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Dated: March 24, 1952.

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[5] p. 3, Frankfurter, J.

[6] *Summary Contempt: A Sword or a Shield*, 2 Stanford Law Review 763; see also 99 Univ. of Penna. Law Review (1951) 540-543.

Certificate of Counsel

I, PAUL L. ROSS, do hereby certify that I am counsel for the petitioners herein, and that this petition for rehearing is presented in good faith and not for delay.

March 24, 1952.

PAUL L. ROSS.

MOTION FOR STAY OF MANDATE

The petitioners, through the undersigned, their counsel, hereby move this Court for an order staying the mandate until the petition for rehearing filed herewith shall have been considered and determined by this Court, upon the following grounds:

1. The petitioners Crockett, Gladstein, Isserman, McCabe and Sacher are members of the Bar in various jurisdictions. With the exception of the petitioner Isserman, who is presently under suspension, they are actively engaged in litigation and other legal matters on behalf of their clients. For this reason, they would suffer peculiar and unusual hardship if they were compelled to serve the sentences before the petition for rehearing is finally disposed of by this Court.

2. Unless the order for stay of mandate is granted, the petitioners may be compelled to serve a substantial portion of their sentences before the action of this Court is final.

3. In the event of favorable action by this Court, if there is no stay of the mandate, the petitioners, as members of the Bar, would have suffered special and peculiar humiliation, with consequent adverse effect upon their pro-

fessional standing and relations with their clients, whose interests would have been needlessly jeopardized.

4. The dissenting opinions and the arguments set forth in the petition for rehearing raise very serious doubts as to the correctness of this Court's decision and afford substantial grounds for rehearing by this Court.

PAUL L. ROSS,
Counsel for Petitioners.

Dated: March 24, 1952.